No. 10695

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLTVILLE ICE AND COLD STORAGE COMPANY, ASSOCIATED FARMERS OF IMPERIAL COUNTY, and HUGH T. OSBORNE,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

Brief for Respondents, Associated Farmers of Imperial County and Hugh T. Osborne.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

MISCELLANEOUS.

STATUTES.

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Jurisdiction.

This case is before the Court upon petition of the National Labor Relations Board for an enforcement of its order issued against these respondents pursuant to Section 10(c) of the National Labor Relations Act (49 Stat. U. S. C. 1940 ed., Title 29, Section 151, *et seq.*) This Court has jurisdiction of the proceeding under Section 10(c) of the Act since these respondents are domiciled or reside within this judicial circuit. The respondent Associated Farmers of Imperial County has its principal place of business within Imperial County and Hugh

T. Osborne resides within said county wherein the alleged unfair labor practices are alleged to have occurred.

The decision and order of the Board are set forth in pages 91-96 of Record and the order with respect to these respondents is set forth in pages 94 (2) to 96—Record.

Statement of the Case.

On April 23, 1943, the Trial Examiner made and filed his Intermediate Report [R. 47-90] and on July 22, 1943, the Board issued its Decision and Order [R. 91-96] and adopted the findings, conclusions and recommendations of Trial Examiner. [R. 92.] Its Findings and Conclusions of Law are in short:

(1) That these respondents are employers of the employees involved in this proceeding within meaning of Section 2(2) of the Act;

(2) That these respondents interfered, restrained, and coerced the employees of the Ice Company in the exercise of their rights guaranteed by Section 7 of the Act;

(3) By such interference and domination these respondents have and are engaging in unfair labor practices within the meaning of Section 8(1) of the Act; and

(4) By dominating and interfering with formation of association are engaging in unfair labor practices within meaning of Section 8(2) of the Act:

And thereupon ordered these respondents:

(5) Not only to *desist from* (a) dominating or interfering with the formation of the association of this Ice Company, but (b) from contributing support and assistance to any other employer; and (c) soliciting funds from this employer *or any other employer* to be used in whole

or part for the purpose of interfering with exercise of the rights of employees guaranteed by Section 7 of the Act, and to mail out appropriate notices to all of its members and contributors.

On March 2, 1944, the Board filed with this Court its petition for enforcement of its order; on March 13, 1944, these respondents filed their answer to petition. [R. 111-116.] In said answer respondents challenge the sufficiency of evidence to support the Board's Findings and Conclusions of law, and further challenges the jurisdiction of the Board's order in that it is in violation of the rights of freedom of speech as guaranteed by the Constitution.

These respondents question the propriety of the Board's order.

The jurisdiction of this Court to hear and determine the matter is not questioned but the jurisdiction of the Board has been and still is challenged.

Summary of Argument.

I. The Act is not applicable to the operations of Ice Company, and therefore not applicable to its alleged agents found to be the employers of the employees within purview of Section 2(2) of the Act.

II. The Board's Findings of Fact from which it concludes (1) that these respondents have violated Sections 8(1) and 8(2); (2) and that these respondents are employers within the meaning of Section 2(2) of the Act, are not supported by substantial evidence.

III. The Board's order is in excess of its jurisdiction and in violation of the right of freedom of speech as guaranteed by the Constitution of the United States.

IV. The Board's order is invalid.

ARGUMENT.

POINT I.

The Act Is Not Applicable to the Operations of the Ice Company and Therefore Not Applicable to These Respondents.

The Labor Board in its brief attempts summarily to dispose of the question of the jurisdiction of the Board over the labor disputes between the Ice Company and the Union. This question may not so easily be disposed of. It is the contention of the Ice Company that its business activities are wholly intrastate in character and that these intrastate transactions do not "affect" interstate commerce. It must, of course, be recognized that almost without exception the jurisdiction of the Board has been upheld. However, it cannot be true that the Board has jurisdiction in every case. There are manifestly many employers who are not subject to the jurisdiction of the Board and who do not fall within the provisions of the Act. Neither can it be determined in advance that the conclusion of the Board upon the question of jurisdiction is binding upon the courts. The Board may err; in this case the assumption of jurisdiction by the Board was erroneous.

At the outset, a distinction must be noted between those employers who are directly engaged in interstate commerce and those whose activities are claimed to have but indirect effect on that commerce. Where the goods of the employer are brought into the state from beyond its territorial boundaries and where the goods of the employer are sent by the employer beyond the borders of the state, the activities of the employer are directly concerned with commerce between the states. On the other hand, where

the employer is not himself engaged in interstate commerce, his activities may, nevertheless affect interstate commerce. In the first instance, no matter how small in amount or in percentage the interstate business of the employer may be, it is manifest without proof that a cessation of the business of the employer will have some effect upon the flow of commerce between the states. In the latter case, the indirect effect of the business activities of the employer upon interstate commerce must be the subject of proof. It will not do to show merely that there is a possibility of some effect upon interstate commerce by reason of activity which has at best but an indirect effect upon goods moving from one state to another.

In the case at bar *no proof* was adduced before the Board which tended to show that an interference with the business activities of the business of the Ice Company would cause a lessening of the flow of vegetables from California into Arizona or any other state. The Ice Company offered to prove that there were four other ice companies within easy distance of the plant of the Company and that if the Holtville Ice and Cold Storage Company were to be shut down there would ensue no interruption in the flow of vegetable shipments, but that the flow of such shipments would continue "without interruption." [R. 512-513.] There was no proof that any of the ice manufactured and sold by the respondent Ice Company left the state of California. The best that can be said of the proof adduced before the Board is that it showed the placing of ice in cars and crates by the purchasers of the ice. Ice is not a permanent thing; it is evanescent in character,—it melts. Judicial notice may be taken that Imperial Valley is an extremely hot coun-

try. The proof goes so far, only as to show that the cooling effect of the ice on the vegetables was desired by the shippers of the vegetables. Many of the cars of vegetables, thus iced, were sold and resold by brokers within the state of California. The products of the Ice Company—the ice—was not shown to be the subject of interstate commerce. The only possible claim which can be made in this connection is that the indirect effect of the stoppage of work in the plant of the Ice Company would indirectly interfere with the shipment of vegetables and interrupt the flow of vegetables from California to other states. It was to this proposition that the offer of proof above mentioned was addressed. This offer was refused [R. 513]; and no other proof was produced which in any wise tended to show that there would, in fact, be such an interruption or interference with the flow of vegetables from California to other states.

It seems clear that such proof of facts showing the probable result of the stoppage of work in the plant of the respondent Ice Company is an essential prerequisite to the assumption of jurisdiction over the Ice Company by the Labor Board:

Edison Co. v. Labor Board (1938), 305 U. S. 197, 220-221;

N. L. R. B. v. Baltimore Transit Co. (C. C. A. 4, 1944), 140 Fed. (2d) 51. (Cert. den. 64 S. Ct. 487);

Southern Colorado Power Co. v. N. L. R. B. (C. C. A. 10, 1940), 111 Fed. (2d) 539;

N. L. R. B. v. Cleveland-Cliffs Iron Co. (C. C. A. 6, 1943), 133 Fed. (2d) 295.

In *Edison Co. v. Labor Board, supra,* the Supreme Court placed great stress upon the "undisputed and impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service of the petitioning companies" (p. 220). The Court was at some pains to point to the evidence which showed the certainty of a "catastrophe" should there be a cessation of the service of the Company to the numerous concerns whose business, in turn, is directly related to commerce between the states. "It cannot be doubted," said the Court, "that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power." Thus upon evidence before the Court the effect of the business activities of the petitioning companies could be determined. In the absence of such evidence no conclusion as to such an effect could be reached.

In *N. L. R. B. v. Baltimore Transit Co., supra,* evidence was produced to show that during the morning rush hours 100,000 passengers were carried by the street railway of the company to outlying industrial areas and 90,000 passengers were carried to the wholesale and manufacturing district in the heart of the city. From the evidence it was made to appear that 45,000 employees of 47 large industrial concerns were dependent upon the company for transportation to and from work. Other evidence showed the interrelation of the transportation system to interstate activities,—an interrelation which was direct and not remote.

The transportation system furnished by the company was the only transportation available to move so vast an army of workers to and from their work, and their work was directly connected with interstate commerce.

In *Southern Colorado Power Co. v. N. L. R. B., supra,* it was shown by evidence that many of the concerns with which the company had dealings to which power was supplied had stand-by plants which could be used to carry on the interstate business of these concerns. But all did not have such provision for emergencies. Said the Court:

> ". . . Some of the concerns furnished electric energy by petitioner had emergency equipment which could be used in the event that the supply of power from petitioner was interrupted. *Others had no such emergency equipment.*" (Emphasis added.)

The Court adhered to the rule that:

> ". . . Where federal control is sought to be exercised over activities which, separately considered, are intrastate in nature, it must appear that there is a *close and substantial relation* to interstate commerce in order to justify federal intervention for its protection. *Unless these facts exist,* the Board has no jurisdiction in a controversy between employer and employees. . . .
>
> "The question whether operations do or do not affect interstate commerce in such a close and intimate fashion as to confer jurisdiction upon the Board *must be determined by the facts as they exist in each case.* . . ." (Emphasis added.)

In *N. L. R. B. v. Cleveland Cliffs Iron Co., supra,* the Court was impressed with the distinctions made in the "painstaking and exhaustive analysis of the cases" made

by respondent. Conceding that the distinctions thus made were apparent it was held that the activities of the company were shown by the evidence to be such that a close and intimate effect upon interstate commerce could be observed. The evidence showed that a subsidiary company was directly engaged in interstate commerce and that the products of the company sold to this subsidiary and others were transported in interstate commerce. The fact that the raw materials supplied by the company to independent agencies were by the latter first processed and converted into other products did not effectively insulate the business of the company from its effect on interstate activity. All of the conclusions thus reached by the Court was based on detailed evidence of the actual state of facts involved.

From the foregoing, it is to be seen that there is no presumption of jurisdiction in the Board. Facts must be before the Board and before the Court upon which the effect of the activity of the employer may be evalued. The close and intimate, the substantial effect on interstate commerce must be shown by evidence. Where no evidence in this regard is produced, and where even the evidence offered on the issue is rejected there is no basis for a conclusion that the business activities of an employer has even a slight effect on the interstate activities of the customers of the employer.

Distinguishable from the facts in the case at bar are cases where the customers of the employer must needs rearrange their equipment in order to avoid an interruption in their shipments. Thus in *Pueblo Gas & Fuel Co. v. N. L. R. B.* (C. C. A. 10, 1941), 118 Fed. (2d) 304, it was shown that the customers of the employer could by

rearrangement of their plants use coal burners instead of gas. This difficult and costly process was held to be, in itself, evidence of the necessary effect of a stoppage of work by the employees of the company.

In the case at bar, however, the offer of proof included evidence that there would be no interruption in the supply of ice to the shippers. Even without this offer, there is no evidence that the shut down of the Ice Company plant would interfere with the shipment of vegetables to any degree. The inference drawn by the Board that the business of the Ice Company affects interstate commerce is not based on any evidence, substantial or otherwise.

Distinction must also be made between those cases, which like the *Edison Co.* case require proof of a substantial connection with interstate commerce and those cases which hold that no substantial effect is necessary to be shown. The difference lies in the circumstance that in the one case the business of the employer had only an indirect effect on interstate commerce, while in the latter case the products of the company went directly into the channels of commerce and were themselves transported.

In the latter class of cases fall the following:

Labor Board v. Fainblatt (1938), 306 U. S. 601;

Labor Board v. Bradford Dyeing Ass'n (1939), 310 U. S. 318;

N. L. R. B. v. Henry Levaur, Inc. (C. C. A. 1, 1940), 115 Fed. (2d) 105;

Cudahy Packing Co. v. N. L. R. B. (C. C. A. 10, 1941), 118 Fed. (2d) 295.

In each of the above cases the employer either had the actual goods in its hands and actually controlled the ship-

ments to and from its plant or produced or processed goods belonging to it which afterwards found their way into the channels of interstate commerce. Language therein contained to the effect that there need be no showing of any substantial effect on interstate activities of others is manifestly not to be applied where the goods are neither under the control of the employer nor do the finished products of the employer find their way across state lines.

Here, in the case at bar, there was no proof that any of the ice of respondent Ice Company at any time left the State of California. The nature of the product tends to negative any inference that the ice may have been so transported. Neither does the respondent Ice Company directly control the flow in interstate commerce of any product of others.

There remains one final case to be discussed. In *Butler Bros. v. N. L. R. B.* (C. C. A. 7, 1943), 134 Fed. (2d) 981, the employer maintained a building tenanted by firms engaged in interstate commerce. The cessation or interruption of janitor service in this building was held to affect interstate commerce and to give to the Board the jurisdiction provided in the Act. There, again, it was manifestly impossible to service the building by other means should a labor dispute arise. Unlike the facts in the case at bar, the facts in the cited case disclose that there would necessarily occur an interference with the interstate business of the tenants were the building occupied by them closed. In the case at bar, we have seen, there was rejected an offer to prove that the interstate activities of the vegetable shippers would go on without interruption were the Ice Company shut down.

Unless we are to say that every employer in his business activity affects the flow of interstate commerce, there must come at last before the courts a case where the employer is not subject to the Act, and beyond the jurisdiction of the National Labor Relations Board. The facts upon which a determination that the business of an employer affects the interstate activities of others is made should be before the Board and before the court. In this case the determination of the Board that the jurisdictional element is present is wholly lacking in evidenciary support.

POINT II.

A. Organization and Functioning of Inside Union, Holtville Ice & Cold Storage Employees Association.

For the purpose of this proceeding the Trial Examiner has given the background of the respondent Associated Farmers and the purposes for which it was organized. [R. 51-52.]

The evidence in this proceeding establishes that respondent Osborne was and is a farmer, member of Board of Supervisors and Secretary-Manager of Associated Farmers of Imperial County. [R. 199.]

On the night of 26th of September, 1941, and prior to commencement of operations by the Ice Company and while Willard was still absent from Holtville ten of employees signed application blanks to become members in the A. F. of L. and on the following day, 27th, having learned that they could not have their own officers [R. 693] began looking around for another method to give them a union of which they were in control. [R. 693.] Herring had

talked with a Cramer Baking Co. driver-salesman by name of "Leo" on the 27th of September, and had asked him about the employees association at the Cramer plant [R. 691] and whom they could get to help them and "Leo" referred him to Osborne [R. 692], and the following day Herring called Osborne at the office of Associated Farmers and asked him to come over [R. 693] and the next day or two Osborne went to Holtville to see Herring [R. 693] and Herring told Osborne that the men wanted an Independent Union and wanted Osborne to help them [R. 694], and gave him the names of some of the employees and in so doing necessarily gave him the names of those who had signed application blanks at the hall of the A. F. of L. on the night of the 26th of September, 1941, as Harlan was the only employee at that time who had not signed. [R. 694.] Osborne told Herring to contact the boys and see how many were interested, which Herring did in the following several days. [R. 695.] Within a week, eight of the thirteen employees met at Harlan's house and Herring called Osborne to be present [R. 697] and Osborne met and on the questions asked by the men told them of one independent union which was going along all right (Cramer's) and left, telling them to find out what the employees wanted to do and if they needed him to call him. [R. 697.] Osborne met with them at their request on October 15th and advised them only as to procedural matters. Osborne on request advised them that Whitelaw was an attorney familiar with labor matters. Following advice by Whitelaw at his office and after several more meetings the association came into legal being on October 30, 1941, with all the then employees excepting supervisory and clerical.

The contact by Willard with Osborne was on Willard's phone call and was subsequent to the time or times hereinabove set out because Osborne knew of the union activity already [R. 197-198] and had talked to Herring and Harlan as early as September 27th or 28th, and at that talk with Willard did not discuss any of the matters disclosed by the employees, Herring, Harlan, etc. [R. 199, 828-829, 220.] Willard asked Osborne to make an investigation but Osborne never gave Willard any report what he found except to tell Willard "That the men were still loyal to him and wanted to work for him." [R. 228-229.]

In the initial talk with Willard, when advised by Osborne that he (Willard) could do nothing except to keep hands off he was perturbed over that advice [R. 220] and sought legal advice from Attorney Whitelaw. [R. 563.]

In Osborne's talks with Herring, Harlan, and Stout, mention was made of *one* employee's association, "Cramer's", and none other, and both Herring [R. 691] and Stout [R. 756] knew of this association through other sources, and the Board found [R. 53] that the employees first became interested in union organization as early as April or May of 1941, but that interest was in an *employee's association.* [R. 687.]

There is absolutely no evidence that Osborne or Associated Farmers formed or had anything to do with forming or setting up a number of any unaffiliated organizations. [R. 53.] This finding is entirely without support. The only evidence in this respect is that the Associated Farmers were in favor of employee's associations.

In all the testimony there is nothing from which the Board can base its finding that Osborne suggested the

formation of "unaffiliated" union [R. 57, 58], but quite to the contrary the entire evidence of Osborne [R. 225, 226], Herring [R. 690-693], Stout [R. 740-744], Harlan [R. 292] shows that all the suggestions came from one or more of the employees and that the birth of idea was in their minds, bringing Osborne into the picture only from suggestion of an outsider "Leo."

We must concede that Osborne testified that after talking with Willard he contacted some of the employees, but even then in his testimony [R. 225-227], the suggestion came from Harlan, and in his subsequent conversations

> "They had gone into the matter of local association, and decided that is what they wanted to do. They wanted my advice. I advised them they could do whatever they wanted to do. They wanted to organize and I explained procedure." [R. 230.]

We further concede that it is well settled rule of law that the Findings of the Board as supported by substantial evidence are binding upon the Court but we are satisfied that it is the further rule of law substantiated by the cases that the Courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

We respectfully submit that the Board in arriving at its Findings upon which its Conclusions of Law are based were arrived at by taking only a part of the evidence and totally disregarding the other convincing evidence as it has in the above finding just quoted and particularly in its Finding at the top of page 61 of the Record, and its Finding contained on page 62 of the Record.

We respectfully refer to a decision of this Ninth Circuit decided on December 3, 1938, and being the case of *N. L. R. B. v. Union Pacific Stages, Inc.,* on which a rehearing was denied on January 9, 1939 and we feel that this particular case is of such value to the determination of our case at bar that we wish to quote at length from the above case, which case is cited in 99 Federal (2d) 153, 177:

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or atttack by Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A. §160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.
>
> " 'We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported, 29 U. S. C. A. §160(e) (f); Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.'

Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F. 2d 985, 989.

" 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

"The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought. National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F. 2d 13, 15.

"See, also, Ballston-Stillwater Knitting Company, Inc. v. National Labor Relations Board, 2 Cir., 98 F. 2d 758, decided August 1, 1938."

It appears that the authorities are in accord with the theory in the above cited case that the findings of the Board are not conclusive upon the Circuit Court of Appeals unless supported by a relevant and material evidence, *National Labor Relations Bd. v. A. S. Abell Co.* (1938, C. C. A. 4th), 97 F. (2d) 951; *National Labor Relations Bd. v. Bell Oil & Gas Co.* (1938; C. C. A. 5th), 98 F. (2d) 406 (rehearing denied in (1938, C. C. A. 5th)

98 F. (2d) 870), and to the further conclusion that hearsay and non-expert opinion evidence cannot be used in the Circuit Court of Appeals as the basis to support the findings upon which an order, which is sought to be enforced rests. *Consolidated Edison Co. v. National Labor Relations Bd.* (1938), 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206; *National Labor Relations Bd. v. Columbia Enameling & Stamping Co.* (1939), 306 U. S. 292, 83 L. Ed. 660, 59 S. Ct. 501.

It is our contention and we most seriously make the same that the Board in making its findings in order to support its order herein made with respect to these respondents has taken not only irrelevant and immaterial testimony, but the rankest hearsay testimony entirely unsupported. One glaring example is the testimony of Henry G. Miller [R. 360-363] in which it has made the finding that the inference is warranted, in view of Metz's statements to Miller that he talked with Metz at the behest of Osborne [R. 59], and the further finding that the Associated Farmers and the Ice Company are responsible for the acts of Metz. [R. 62.]

The Board has further violated the Rule of Law laid down in the above cited cases in that it has totally failed to take into consideration the testimony as a whole but has in its desire to sustain the attack by the labor unions upon the Associated Farmers and Osborne, completely ignored relevant and competent testimony adduced by its attorney from witnesses such as Herring, Stout, Harlan, and Willard, but has reached into the realm of "inferences" in order to attempt to sustain its position taken.

B. Freedom of Ice Company Employees From Interference, Restraint, or Coercion in the Exercise of the Right of Self-Organization.

The Board takes a most peculiar position in that it finds that the complaining witness, the A. F. of L. Union, did not have a majority among the employees at the time or subsequent to the time of the inquiries herein, yet it takes the position that the expression of the employees was not a free expression of themselves, but dominated by the Company under the activities of Osborne, the Secretary-Manager of the Associated Farmers.

To sustain that position they have gone far afield to assume and find that Osborne dominated the employees and coerced them into forming an employee's association. The only basis for such a finding is that they ignore all competent and relevant testimony and fail to take into consideration all the testimony adduced before them and solely from the conversation of Osborne with Willard in which Willard asked Osborne to "interest himself" in the Union activities, which was met by a reply from Osborne that he would make an "investigation." There is nothing in the record which would support any finding that Osborne would do anything more than make such an "investigation," which he admits having made and upon severe cross-examination by the Board's attorney, stated that he made no formal report to Mr. Willard concerning such "investigation," but that the employees were loyal to Mr. Willard and wanted to work for him. There is nothing in this statement, which can possibly be construed by the Board or by this Court, that Osborne did anything else than make an "investigation."

The evidence is absolutely conclusive and uncontradicted that the men themselves as early as February, 1941, talked of an employee's association and as the record discloses the plant is closed during the summer months and it was not until the complaining Union attempted to organize the prospective employees of the Ice Company, did the question of an employees association again arise, at which time, shown by the evidence hereinabove quoted and referred to, the idea of an employee's association was the mind child of a group of men, Harlan, Herring, and Stout, and was not suggested or fostered by Osborne; that the association didn't come into legal being until October 30, 1941, was from the fact that the plant did not start until that time and the men didn't know who would be the actual employees as some of them were bound to be let out by reason of the change over from the diesel to the electric plant. [R. 737-738.]

No doubt Mr. Smith in his brief has fully covered these facts and they are, therefore, not repeated here.

The testimony of Herring [R. 690-693] and of Stout [R. 737-742] is uncontradicted evidence to the effect that neither Osborne nor Willard had anything whatsoever to do with the employees favoring an employee's association over that of the Union, and we respectfully urge the Court to bear in mind that these two men had signed application to become Union members. The evidence of these two men is of such a character that the Court cannot overlook it and emphasizes the fact that the em-

ployee's association was the vehicle by which the men wished to operated as bargaining agent.

There is no testimony that any employee joined the association because he felt that his employer Ice Company expected or wanted him to or because he feared he might incur the displeasure of the Ice Company, if he failed so to do.

There is nothing in the testimony of any witness that any adverse effect would follow membership in the A. F. of L. Union and certainly the negotiations had by the members of the Union with Willard, which discloses that the entire membership at one time or another was in such negotiations, coupled with the advantages gained by the association, is certainly contrary to any finding that this association was not the free choice of the employees.

The case of *National Labor Relations Board v. Automotive Maintenance Marchinery Co.,* 116 Fed. (2d) 350 (C. C. A. 7th, 1940) clearly establishes the impropriety of the Board's conclusions and order in the instant case.

We believe and respectfully submit that the evidence clearly establishes the fact that it was and is the desire of the employees to have an employee's association and that the Board cannot order its disestablishment in face of this expression. The case above is ample authority for this proposition and bearing in mind that the A. F. of L. Union was not the legal representative of the employees, then this Board, by its order, seeks to determine for the employees that they have no right of choice, which in the very essence of things, is in violation of the National Labor Relations Act and contrary to the cited case *supra.*

C. Freedom of Employees From Domination or Interference With the Formation of Their Labor Organization.

The Board has based its Conclusions of Law and Order upon the finding that Willard being a contributor to the Associated Farmers and in asking Osborne to "interest" himself in Willard's affairs that the acts of Osborne were the acts of Willard in that Osborne and the Associated Farmers became the employer within the meaning of Section 2(2) of the Act.

There is evidence that the Associated Farmers' policy was in favor of employee's association as against a closed shop union A. F. of L. or C.I.O. contract, but there is no evidence in the record that the Associated Farmers either through Osborne or any of its officers, or other agents had actually formed an employee's association. There is nothing in the evidence that Willard knew or had reason to know of the policy as expressed by Osborne of the Associated Farmers being in favor of the employee's associations. If Osborne or the Associated Farmers became the agent of Willard under the Civil Code of the State of California §2295:

> "An agent is one who represents another called the principal in dealings with third persons such representation is called agency."

§2298:

> "An agency is either actual or ostensible."

§2299:

> "An agency is actual when an agent is really employed by the principal."

§2300:

> "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him."

Osborne was neither representing Willard nor holding himself out to represent Willard. An agent's authority, if actual, must be communicated to that agent by the principal. We must ask ourselves, therefore, what were the duties of Osborne, what did Willard mean when he asked Osborne to "interest himself"? The subject matter between Willard and Osborne was the activity by the A. F. of L. Union among the men who might become employees of Willard the next ensuing season and its own contention and we believe we are correct from the evidence in stating that Osborne was to do nothing other than to inquire and determine how far the Union had succeeded in securing members among the men who might become the employees of Willard when he opened up his plant in November. We feel that any other inference which is drawn from this testimony is not founded upon substantial evidence.

There is evidence from Osborne's testimony that he inquired of certain of the employees as to the activity of the A. F. of L. Union but the *substantial* evidence is that the men who were instrumental in forming the employee's association brought to Osborne's attention the solution of their troubles by the means of the inside union. Conceding for the moment the finding of the Board that Osborne suggested the formation of the inside union, yet there is nothing claimed by the Board nor any evidence introduced that Osborne made any threats other

than the testimony of Davis to the effect that Osborne stated that Willard would close his plant down rather than have the A. F. of L. Union take charge of it, which from the evidence itself, shows that this statement was merely an opinion of Osborne and nothing coming from Willard, nor nothing to which he had been authorized to state to any of the employees in his representative capacity, if such existed. The most which could be said from the acts and expressions of Osborne conceding the findings of the Board to be correct would be that he indirectly conveyed to the employees the feeling and opinion of Willard that the A. F. of L. Union was not necessary and that Willard did prefer that the Union did not come into his plant. Such expressions even made by a principal and not by one who has been declared by the questionable relevant and competent testimony to be an employer within the meaning of this Act would not be a violation of the National Labor Relations Act.

Such proceedings do not constitute coercion or intimidation but fall squarely within the privileges guaranteed by the Fifth Amendment to the Constitution. These privileges have been construed recently and decided by our Supreme Court in the following cases:

National Labor Relations Board v. Virginia Electric & Power Company, 314 U. S. 469 (1941);

National Labor Relations Board v. American Tube Bending Co. (1943), 134 Fed. (2d) 993; 146 A. L. R. 1017; note page 1024;

Press Co. v. National Labor Relations Board, 118 Fed. (2d) 937;

National Labor Relations Board v. Citizen-News Co. (C. C. A. 9, 1943); 134 Fed. (2d) 962.

If in the purview of these cases that expressions and acts attributable to Osborne were not coercion, even though he may have represented Willard, then certainly they are not domination nor interference and the Board's finding and order should not be sustained.

D. Neither Osborne nor Associated Farmers Was Employer Within the Meaning of Section 2(2) of the Act.

The evidence in connection with the findings of the Board have certainly been fully set out, both by the Board and by these respondents, so that the facts are fairly presented to this Honorable Court.

We can get very little help from the authorities to assist us in determining when a person becames an employer within the meaning of the Act, when no actual relationship of employer and employee exists. Osborne and the Associated Farmers had no supervisory control over the employees of the Ice Company. They had no right to hire and fire. The Board in its brief on page 15 has cited certain cases in support of its contention that these respondents acting at the request and in the interest of the Ice Company directly participated in the formation and establishment of the inside union as bargaining agent of the Ice Company's employees. In each of those cases, particularly in the *Shipper Vegetables Association,* cited 122 Fed. (2d) 368, the association did the actual hiring and firing for the association. In the case of *Long Lake Lumber Co.,* the decision of this Circuit cited in 138 Fed. (2d) 363, the respondent Robinson was a local contractor doing the actual hiring and firing and supervising the employees. In the *Taylor-Colquitt Co.,* C. C. A. 4, 140 Fed. (2d) 92, the individual respondent was the wife

of the foreman and she had interfered with the election held by the Board using threats and violence all with the knowledge and acquiescence and approval of the Company. None of these cases were where an independent agency such as the Associated Farmers, a legal entity, restricting its activity to advice and assistance, unaccompanied by any threats or force has been held to be the agent of the employer and the employer chargeable with such acts.

It is a fact that the Ice Company together with hundreds of other individuals and companies have contributed for many years to the support of the Associated Farmers, and it appeals to us very strongly that the mere contribution to the general activities of such an association, over which they have no control, except by refusal to contribute are not of sufficient importance nor of legal weight to connect such contributor with the Associated Farmers as has been done by the Board's findings and order in this instant case.

It is quite apparent that the Board is seeking to stifle the operations and existence of the Associated Farmers for the simple reason that the Associated Farmers have been opposed as shown by their declaration of principals and by testimony of Osborne to be against a closed shop. It is a matter of public record that the Board is openly hostile to inside unions.[1]

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[1]"In regard to independent unions, the National Labor Relations Board has consistently pursued a policy aimed at the extermination of these nationally unaffiliated organizations. . . .

"That the Board strains every sinew to find company domination of independent organizations is demonstrated by the *International Shoe Co. case. . . .*" *Final Report of the Special Committee of the House of Representatives, 76th Congress, 1st Session, appointed Pursuant to H. Res. 258 to Investigate the National Labor Relations Board,* December 28, 1940, in Vol. 4 Bureau of National Affairs, Verbatim Record of the Proceedings, p. 445, at pp. 473, 474.

The provisions of the Act Section 2(2) define "employer" to include "any person acting in the interest of an employer, directly or indirectly." These broad provisions cannot be interpreted in their exact literal significance. If a newspaper editor, a columnist, a radio commentator, a political speaker act in the interest of an employer during a labor dispute the broad language of this subsection would place all of them in the category of an "employer." They would each be subject to a cease and desist order,—not as mere agents of an employer but as principals. The very statement of this proposition shows the absurdity thereof.

Neither have the courts thought that the act was so broad. In *N. L. R. B. v. Moenich Tanning Co.* (C. C. A. 2, 1941), 121 Fed. (2d) 951, 953-4, Judge Learned Hand commented on the finding of the Labor Board that such outsiders were subject to the Act, saying:

> ". . . We cannot, however, see how the declarations of the city attorney and of a 'local banker', or the articles in the village newspaper (later repudiated by the company, as it happened) can be brought into the same class as the declarations of 'supervisory employees'."

Certainly if the acts and declarations of such outsiders could not be attributed to the principal employer, the outsiders could not themselves be classed as employers.

The facts cited by the Board go only to show that Associated Farmers and Osborne became interested in the union activities in Imperial Valley, because of the general nature of the purposes of the organization. It was not shown that the Associated Farmers by any corporate act authorized the particular activities of the respondent

Osborne. It was not shown that Associated Farmers or Osborne acted as the representative of the Ice Company. On the contrary, the implication is strong that the activity of these respondents was in line with the settled policy of this organization and of the preconceived views of Osborne.

It must be recognized that prior to recent decisions of the Supreme Court the question as to whether the employer is himself subject to a cease and desist order because of the acts and declarations of supposed supervisory employees was to be determined on the basis of the principles of the law of agency. This is no longer true. There is now substituted the subjective test as to whether or not the employees believed that the acts and declarations of the supervisory employees were authorized by the employer. The question in this regard now is: Did the employees believe that the supervisor was acting at the direction of the employer?

This Court applied that test in *N. L. R. B. v. Montgomery Ward & Co.* (C. C. A. 9, 1943), 133 Fed. (2d) 676, and therein reviewed the Supreme Court decisions on the point. But in holding that Montgomery Ward & Co. were chargeable with the acts and declarations of a supervisory employee, though done against the specific direction of the employer, this Court did not say (and we think did not mean to say) that this supervisor was himself an employer.

There is some merit to a fiction which makes a supervisor, or other person connected by business relationship to the principal employer, himself an employer. But the creation of the relationship of employer and employee between such an organization such as the Associated

Farmers and the employees of the Ice Company is beyond the normal conception of the function of a legal fiction. Definition in legislation must have some basis in fact. Within bounds such definition eliminates the necessity of proof where proof is difficult, but may be made.

The subjective test above referred to is stated by the Supreme Court in *I. A. of M. v. Labor Board* (1940), 311 U. S. 72, 82, in this language:

> ". . . Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. Here there was ample evidence to support that inference. As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or fire. But they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. . . ."

No evidence herein appears which tends to show that the employees were led to believe, *or that they did in fact believe,* the Associated Farmers or Osborne to be speaking for the management. The anti-union sympathies of Associated Farmers and Osborne appear to have been known to all. These respondents needed no excuse to speak to the employees of any company, including the Ice Company, of their hostility to the coming in of an outside union to the Imperial Valley. But this activity, though it may have been carried on in behalf of the Ice

Company neither makes the Ice Company chargeable with the conduct of the outsiders, nor does it make of the Associated Farmers and Osborne employers. They were neither of them employers of the Ice Company workers and no fiction of law should translate them into such a category.

Unless the Labor Board is to undertake to evaluate the influence of every organization and of every individual who speaks his mind while a labor dispute is in progress, the extension of the term "employer" to mere outsiders should be discountenanced. The language of Judge Learned Hand, above quoted, is opposite to the case at bar.

POINT III.

A. The Declarations Made by Associated Farmers and Osborne Must Be Protected Under the Fifth Amendment of the Constitution.

Free speech is a prized liberty of Americans. In a world where governments tend toward denying their citizens the right to self expression this liberty becomes more dear. This liberty may be limited to the extent that this freedom may not be used to injure others. But it must be with trepidation that we limit the right to freely say what we believe.

The right of employers under the Act must, it is true, be circumscribed so that under the guise of free speech the employer be not permitted to coerce his employees. Employers, themselves, have nevertheless been permitted to state their views without incurring a penalty therefor. And though the views thereby stated were unfriendly to

labor this statement of view unaccompanied by threat of an untoward to those employees in disagreement, the employer has been upheld in his right to self expression.

N. L. R. B. v. Virginia Power Co. (1941), 314 U. S. 469;

N. L. R. B. v. American Tube Bending Co. (C. C. A. 2, 1943) 134 Fed. (2d) 993 (cert. den.);

N. L. R. B. v. Citizen-News Co. (C. C. A. 9, 1943), 134 Fed. (2d) 962;

Press Co. v. N. L. R. B. (1941), 118 Fed. (2d) 937, 942; 73 App. D. C. 103 (cert. den.);

Continental Box Co. v. N. L. R. B. (C. C. A. 5, 1940), 113 Fed. (2d) 93;

Jacksonville Paper Co. v. N. L. R. B. (C. C. A. 5, 1943), 137 Fed. (2d) 148 (cert. den.);

N. L. R. B. v. Superior Tanning Co. (C. C. A. 7, 1940), 117 Fed. (2d) 881 (cert. den.).

It must be remembered that in the language of the foregoing decisions the courts were dealing with the right of the employer himself to express his opinion of labor unions generally and of a particular union involved in a pending labor controversy. Here, on the other hand, we are dealing with the right of an independent organization. Conceding to be true the inference made by the Board that this independent organization was formed for the express purpose of persuading employees from joining a union, still that right still exists. It is still the right of any person or group of persons to entertain and express an opinion that labor organizations are detrimental to our national life. It is still the right of individuals and of organizations, political or otherwise, to urge em-

ployees to form their own union and to deal, not with the A. F. of L. or an affiliate, or with the C.I.O. or its affiliates, but to deal with a local organization of employees. Company unions are not outlawed under the Act. Company dominated unions are so outlawed. But the right to speak is not taken away from those who are not connected with management.

There is no limitation upon the right of outsiders to speak. Things which if said by the employer would violate the law are permitted to those who are not employers. It must be remembered that the provisions of the Act, in so far as they limit the right of the employer to influence his employees, are statutory only. The acts forbidden by this statute are *malum prohibitum* only and not *malum in se*. Things said, which would be prohibited to an employer, are yet lawful when said by one not connected with the business. The law does not yet condemn a Westbrook Pegler. The Associated Farmers and Osborne in the case at bar did not exceed the right guaranteed to them under the Fifth Amendment.

POINT IV.

The Order of the Board Is Invalid.

The Order of the Board directs these respondents to not only cease and desist:

(1) From dominating or interfering with the formation of the employee's association in this instant case, but seeks to tie the hands of these respondents for all future time with respect to its activities in advising with employees and the formation of a union of employees; or contributing support or assistance to any organization of any employer;

(2) Soliciting or collecting funds from any source to be used in whole or in part for purpose of interfering with the rights of employees guaranteed by Section 7 of the Act; which in final analysis would bar the Associated Farmers from the collection of funds for any purpose by placing it subject to contempt of this Court, if at any time it should form or assist in the formation of an employee's association.

By the Order:

Osborne, as an individual, can no longer be a free American citizen.

To say that the Board has taken a broad view of its powers is, we feel putting it mildly.

It has gone beyond any authority which can possibly be construed from the Act.

Had it confined itself to ordering the respondents or either of them from interfering with or dominating the formation of employee's association in the Ice Company, its authority to make such an order (based upon substantial evidence) could not be so seriously questioned. When the Board reaches out and by its order attempts to direct and restrict an association, or an individual in its or his future actions, then, we submit, it is time this Court raises the block signal against such procedure.

We submit that the Order is void in its entirety with respect to these respondents.

In that:

It is violative of the privilege guaranteed by the Fifth Amendment to the Constitution. We respectfully refer this Court to the cases cited under Point III *supra*.

It is based upon findings of fact, unsupported by substantial evidence. *N. L. R. B. v. Union Pacific Stages, supra.*

Conclusion.

It is respectfully submitted that there is no substantial evidence in support of the Board's findings and that the Order of the Board should be denied enforcement in its entirety.

Should the Court find that Osborne and the Associated Farmers were employers within the meaning of the Act, and that Osborne and the Associated Farmers interfered with the formation of the employee's association and dominated the employee's association within the meaning of Sections 8(1) and 8(2), then it is respectfully submitted that this Court should confine its decision and order to the actions of Osborne and the Associated Farmers to the instant case, and the employee's association of the Ice Company, and set aside all other portions of such order, which restricts the freedom of action and speech by the Associated Farmers and Hugh T. Osborne.

Respectfully submitted,

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Dated: July 1, 1944.